FOR ARGUMENT

No. 79-192

In the Supreme Court of the United States

OCTOBER TERM, 1979

NEW YORK GASLIGHT CLUB, INC., ET AL., PETITIONERS

v.

CIDNI CAREY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

WADE H. McCREE, JR.
Solicitor General

DREW S. DAYS, III
Assistant Attorney General

HARRIET S. SHAPIRO
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530

LEROY D. CLARK
General Counsel

JOSEPH T. EDDINS
Associate General Counsel

LUTZ ALEXANDER PRAGER
MARK S. FLYNN
Attorneys
Equal Employment Opportunity Commission
Washington, D.C. 20506

INDEX

Page

CITATIONS

Cases:

Page

Cases—(Continued):

Page

Page

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-192

NEW YORK GASLIGHT CLUB, INC., ET AL., PETITIONERS

v.

CIDNI CAREY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

OPINIONS BELOW

The opinion of the court of appeals is reported at 598 F. 2d 1253. The opinion of the district court is reported at 458 F. Supp. 79.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 1979. The petition for a writ of certiorari was filed August 6, 1979, and was granted October 9, 1979. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Respondent filed an employment discrimination claim with the Equal Employment Opportunity Commission, which was referred under statutory procedures to a state

agency for consideration. The state procedures contemplate that claimants will be represented by privately retained attorneys. Before the completion of the state litigation, respondent was required to file suit in federal court to protect her rights under Title VII. The question presented is whether, in these circumstances, respondent is entitled under Title VII to attorney's fees for work performed in the state proceeding.

STATUTES INVOLVED

Section 706(k) of Title VII, Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k), provides:

> In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988, provides in relevant part:

> In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 U.S.C. 1981-1983, 1985, 1986], * * * the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

INTEREST OF THE UNITED STATES

The Equal Employment Opportunity Commission is the federal agency responsible for administering, interpreting and enforcing federal employment discrimination statutes, including Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Private employment discrimination suits provide the Commission with

essential assistance in the enforcement process. See *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 45 (1974). State and local fair employment agencies play an important role in the resolution of employment discrimination complaints, often making it unnecessary for injured parties to resort to the federal courts for relief. *Oscar Mayer & Co.* v. *Evans*, No. 78-275 (May 21, 1979), slip op. 4. Charges of employment discrimination, whether filed with the Equal Employment Opportunity Commission or with state and local fair employment practice agencies, thus constitute a common agenda; the activities of the state agencies are an integral part of the effort to achieve nationwide compliance with Title VII. See Section 5.1, EEOC Compliance Manual. Accordingly, the question whether an injured party can obtain an award of attorney's fees for services rendered during a state fair employment proceeding affects Title VII enforcement.

STATEMENT

In January 1975, respondent Cidni Carey filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging that she was refused employment as a waitress by petitioner New York Gaslight Club because of her race (C.A. App. 25a). As required by Section 706(c) of Title VII, 42 U.S.C. 2000e-5(c), her charge was forwarded to the local state fair employment agency—here, the New York State Division of Human Rights (C.A. App. 26a); also in accordance with Section 706(c), the EEOC automatically assumed jurisdiction of the charge sixty days later.

Federal and state proceedings thereafter followed parallel tracks. The New York Division acted first,

beginning its investigation of the charge in March 1975.[1] In May 1975, the New York Division found probable cause to believe that respondent's charge of employment discrimination was true (Opp. App. 25a-26a). Under New York law, after such a determination, the Division directs the employer to answer the charge at an adversarial public hearing before a hearing examiner. N.Y. Exec. Law § 297(4)(a) (McKinney 1972-1978 Supp.). At the hearing "[t]he case in support of the complaint shall be presented by one of the attorneys or agents of the division and, at the option of the complainant, by his attorney." *Ibid.* Because of a growing caseload and staff limitations (Pet. App. A58-A59), complainants at that time were "encouraged" to obtain private counsel so that staff attorneys could work on other matters (Pet. App. A59).[2] That was the procedure followed here. The two-day hearing was held in late 1975 and early 1976; no attorney for the state appeared. "[T]he entire burden of placing evidence into the record, and arguing the significance thereof, was borne by the attorney for the plaintiff" (Pet. App. A59; A. 68).

---

[1]As part of that investigation, respondent appeared at conferences to discuss the possibility of resolving the dispute through conciliation (Opp. App. 25a). Respondent, who was too poor to employ her own attorney, was represented by counsel employed by the NAACP Special Contribution Fund, Inc. (Pet. App. A56; Opp. App. 23a).

[2]On October 9, 1977, Division regulations were amended to provide that:

> If the complainant is represented by an attorney, such attorney shall solely present the case in support of the complaint on the consent of the division attorney. The division attorney shall prepare and submit to the hearing examiner or chief hearing examiner a statement in lieu of appearance together with the jurisdictional papers.

9 N.Y.C.R.R § 465.11.

On August 13, 1976, the hearing examiner found that petitioner discriminated against respondent because she is black (A. 70). Petitioner was ordered to offer respondent employment as a cocktail waitress and to give her back wages at the rate of $52 per week from August 1974, to the date of reinstatement (A. 71).[3]

Petitioner appealed to the State Human Rights Appeal Board,[4] which held a hearing on December 8, 1976 (C.A. App. 38a). Petitioner appeared by counsel, as did the Division and respondent (*ibid.*).

Meanwhile the EEOC district office had conducted its own investigation, in which it gave due weight to the findings of the New York Human Rights Division in accordance with Section 706(b) of Title VII, 42 U.S.C. 2000e-5(b). On December 20, 1976, while the State Appeal Board was considering the appeal from those findings, EEOC determined that there was reasonable cause to believe petitioner had violated Title VII (Resp. Br. App. a4-a5). As required by Title VII (42 U.S.C. 2000e-5(b)), EEOC attempted conciliation, but those efforts failed. After the EEOC General Counsel decided not to sue, administrative processing of the charge ended in July 1977. As required by Section 706(f)(1) of Title VII, EEOC thereupon issued respondent a Notice of Right to Sue, authorizing her to file a Title VII suit (42 U.S.C. 2000e-5(f)(1)). The notice was issued on July 13, 1977 (C.A. App. 15a-16a); respondent had ninety days from her receipt of the notice within which to file her Title VII suit (42 U.S.C. 2000e-5(f)(1)).

---

[3]The $52 was based on average wages earned by other waitresses since 1974 (A. 70).

[4]The Board is an independent state agency established to hear appeals from orders of the Commissioner, who heads the Human Rights Division. N.Y. Exec. Law § 297-a (McKinney and 1972-1978 Supp.). A Division attorney appears before the Board to seek enforcement of the Division's order. The Division cannot appeal from the decision of the Board (Opp. App. 17a-18a; Pet. App. A60-A61).

On August 26, 1977, the New York State Human Rights Appeal Board affirmed the order of the Division of Human Rights (C.A. App. 40a-41a). Petitioner immediately appealed the Board's decision to the Appellate Division of the New York Supreme Court (C.A. App. 42a). The Division cross-petitioned for enforcement of its order (*ibid.*).

On September 30, 1977, respondent filed suit in federal district court under the Civil Rights Act of 1866, 42 U.S.C. 1981; Title VII; and the Thirteenth Amendment (A. 29-34).[5] The complaint outlined the events leading to Gaslight's rejection of respondent's application for a job and noted that Gaslight had employed only four blacks of "perhaps thousands" employed as waitresses during the twenty years of its existence (A. 32). The complaint sought a declaratory judgment that petitioner's practices were unlawful under federal law; an order requiring petitioner to hire respondent; back pay, interest, and other benefits she would have obtained had she been hired in 1974; attorney's fees; and unspecified other relief (A. 34). Petitioner's answer denied liability and cited the pendency of the state proceedings as an affirmative defense (Resp. Br. App. d1).

On November 3, 1977, the New York Supreme Court Appellate Division unanimously affirmed the State Appeal Board's determination. *New York Gaslight Club* v. *State Division of Human Rights on the Complaint of Carey*, 59 A.D. 2d 852 (1st Dept. 1977). Petitioner unsuccessfully moved for reargument, and then filed a motion in the New York Court of Appeals for leave to appeal and for a stay of the Division order (Resp. Br. App. b19-b20, b21-b22).

---

[5]When the federal suit was filed, more than a month of the 90-day Title VII statute of limitations, and two and a half years of the three-year Section 1981 statute of limitations, had expired. There was no indication that the state proceedings would be promptly resolved.

On February 3, 1978, the district court held a pretrial conference at which petitioner agreed that if the New York Court of Appeals denied its motion for leave to appeal, it would comply with the Division's order (A. 73). One week later, on February 14, 1978, the Court of Appeals denied petitioner's motion. *New York Gaslight Club* v. *State Division of Human Rights on the Complaint of Carey*, 43 N.Y. 2d 951 (1978).

The parties thereupon apparently agreed to settle the federal action, except as to attorney's fees.[6] Filings in the district court thereafter related solely to that issue (A. iii).[7] In July 1978, the district court dismissed respondent's complaint on the ground that the state appeals from the Division order had "been exhausted after the filing of this action," but left the application for attorney's fees pending (A. 35). After further briefing, the

---

[6]On February 17, 1978, respondent's counsel wrote the district judge that in light of the Court of Appeals' action,

> it would seem that the federal action could in all likelihood be dismissed. However, it is our considered opinion that, since we were compelled to file the Title VII action while the State proceeding was in process, we are entitled to some attorneys fees, if nothing else (assuming that the action is otherwise dismissed but without committing my client to that position at this time).
>
> I would suggest that this matter be scheduled for a conference before your honor in order to determine where the federal action will go. In the mean time, we will consult with the attorneys for the Defendants in order to be able to advise you [of] our respective positions (some or all of which we may agree upon).

A. 76.

[7]Respondent's counsel asked compensation for 82 hours. Of that time, nine hours were spent in preparing and filing the EEOC charge and federal suit; 22 hours were spent in preparing and presenting the case to the hearing examiner; and 29 hours were spent in defending the determination in respondent's behalf before the Appeals Board and the state courts (Pet. App. A39-A40).

court denied the application for fees without mentioning counsel's time in the federal proceedings, saying that the filing of a federal suit did not entitle an aggrieved party to an award of attorney's fees for work done at the state level (Pet. App. A24-A28; 458 F. Supp. 79).

The court of appeals reversed, one judge dissenting (Pet. App. A1-A23; 598 F. 2d 1253). It held that the language of Section 706(k) allowing attorney's fees to prevailing parties in "any action or proceeding under this subchapter" encompassed awards of counsel fees for work done in connection with state proceedings (Pet. App. A8). The court noted that "[d]eference to state mechanisms for resolving discrimination complaints is an integral part of the enforcement process under Title VII" and that consequently "state human rights agencies play an important role" in achieving the goals of Title VII (Pet. App. A6-A7, A8). The court found that the complainant's "need to retain private counsel at the state administrative stage in a Title VII claim is therefore real"(Pet. App. A11); that an award of attorney's fees would provide an incentive for the development of a thorough administrative record at the early stage of proceedings; and that the denial of an award would encourage needless litigation by prompting complainants to abandon state proceedings for the federal courts (Pet. App. A11-A13).[8]

SUMMARY OF ARGUMENT

As part of the complete remedy afforded by Title VII and 42 U.S.C. 1988 to persons who have been subjected to employment discrimination, attorney's fees should be awarded to a prevailing plaintiff in all but exceptional circumstances. The fact that a part of the fees awarded

[8]On remand the district court awarded respondent $6,000 in attorney's fees (Resp. Br. App. e3). Respondent's back pay award, after taxes, came to $6,500.

here was for work performed in state administrative and judicial proceedings is not an exceptional circumstance making the award inappropriate.

Respondent was required to bring suit in federal court to protect her federal rights when she did not receive timely relief in the state proceedings. When the state proceedings eventually terminated successfully, she settled the federal suit, becoming the prevailing party in that suit, entitled to an award of attorney's fees for all work reasonably necessary to achieve that result. The limited agency staff participation on behalf of the complainant and the quasi-judicial nature of the New York proceedings make it reasonably necessary for an aggrieved party to retain private counsel to protect his interests in those proceedings.

In any event, Title VII requires that a claim of employment discrimination be referred first to an appropriate state agency; the state proceeding is thus an integral part of Title VII's enforcement scheme, and is consequently a "proceeding under this title" for which attorney's fees are available under Section 706(k). Moreover, the availability of attorney's fees for work performed in the state proceedings facilitates the operation of Title VII by encouraging the effective utilization of those proceedings, thus minimizing the need to rely on the supplemental federal remedy and leading to the prompt and effective elimination of employment discrimination.

ARGUMENT

A. RESPONDENT IS ENTITLED TO ATTORNEY'S FEES AS A PREVAILING PLAINTIFF

This Court has emphasized that Title VII is intended to "make persons whole for injuries suffered on account of unlawful employment discrimination," and to provide

"the most complete relief possible." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418, 421 (1975). Accordingly, Congress has instructed the courts, in their discretion, to award the prevailing party attorney's fees in Title VII suits (Section 706(k), 42 U.S.C. 2000e-5(k)). Because Congress has cast a Title VII "plaintiff in the role of 'a "private attorney general," vindicating a policy that Congress considered of the highest priority,' * * * a prevailing plaintiff under Title [VII] 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' " *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 416-417 (1978), citing *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 402 (1968); *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 415; and *Northcross* v. *Memphis Board of Education*, 412 U.S. 427, 428 (1973).

The identical language in 42 U.S.C. 1988 should be similarly construed. That language was enacted as the Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641, in swift response to the Court's decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), holding that there could be no awards of attorney's fees under the "private attorney general" concept absent explicit congressional authorization. 421 U.S. at 260-261. This immediate congressional reaction reflected a concern that "[i]f our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases." S. Rep. No. 94-1011, 94th Cong., 2d Sess. 6 (1976).

The principle that attorney's fees are recoverable "in all but special circumstances" (*Christiansburg Garment Co.* v. *EEOC*, *supra*, 434 U.S. at 417) implements the congressional view, reflected in Title VII, the Civil

Rights Attorney's Fees Awards Act of 1976, and other civil rights acts.[9] that attorney's fee awards are necessary to make it easier for persons of limited means to secure relief from racial discrimination. See 110 Cong. Rec. 12724 (1964) (remarks of Senator Humphrey); S. Rep. No. 94-1011, *supra*, at 2.[10]

No special circumstances making an award of attorney's fees inappropriate exist here.[11] To the contrary, the circumstances of this case make such an award especially appropriate. At the time respondent brought her suit in federal court under Title VII and 42 U.S.C. 1981, she had received no relief in either the state or the federal proceedings. To protect her federal rights, she was required to bring suit in federal court. The EEOC administrative process had ended and she had been issued a notice of right to sue; she had to bring her suit within 90 days after receiving that notice. Similarly,

---

[9]Since 1964, every major civil rights law passed by the Congress has included, or has been amended to include, one or more fee provisions. See, *e.g.*, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3612(c); Voting Rights Extension Act of 1975, 42 U.S.C. 1973(*l*)(e); and Emergency School Aid Act, Pub. L. No. 95-561, Section 601(a), 92 Stat. 2266.

[10]Petitioner's suggestion (Pet. 9) that the court of appeals' reasoning would also require the award of attorney's fees to a prevailing defendant is inconsistent with *Christiansburg Garment Co.* v. *EEOC*, *supra*, 434 U.S. at 420-422.

[11]Petitioner's argument (Br. 10-12) that the district court's denial of attorney's fees was simply a reasonable exercise of its discretion ignores the special policy favoring the award of attorney fees to prevailing plaintiffs in discrimination cases. In any event, the question whether the court of appeals should have reviewed the attorney fee award only to determine whether the district court had abused its discretion is not presented in the petition for certiorari, nor is it fairly comprised within the questions presented. See Rule 40(d) of the Rules of this Court.

only four months remained under the statute of limitations applicable to her claims based on Section 1981.[12]

Even after petitioner decided not to litigate further in the state proceedings, respondent could have continued her federal suit. Instead, respondent agreed to settle that suit, forgoing her federal right to additional back pay,[13] interest, and compensatory and punitive damages.[14] At that point, she became the prevailing party in the federal suit.[15] Consequently she is entitled at least to attorney's fees for the preparation of the federal action, the writing and filing of the charge and complaint, attendance at

[12]Nor was the need to file her federal suit the result of too hasty action by the EEOC in issuing the notice of right to sue, as the district court implied (Pet. App. A26). That notice was not issued until after the state administrative proceedings had been concluded, and EEOC had completed its investigation, made a finding of reasonable cause, had unsuccessfully attempted conciliation, and had decided not to sue (see *supra*, page 5).

[13]The $52 per week back pay award was based on 1974-1975 salary levels. Respondent was not offered a job until 1978, when salaries undoubtedly had risen substantially as a result of inflation. In addition, it is not clear whether the $52 included customer tips.

[14]Compensatory and punitive damages are available under Section 1981. See *Johnson* v. *Railway Express Agency*, 421 U.S. 454 (1975); *Allen* v. *Amalgamated Transit Union Local 788*, 554 F. 2d 876 (8th Cir.), cert. denied, 434 U.S. 891 (1977).

[15]In enacting the Civil Rights Attorney's Fees Awards Act, Congress explicitly stated that "parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief." S. Rep. No. 94-1011, *supra*, at 5. See *Bonnes* v. *Long*, 599 F. 2d 1316, 1318 (4th Cir. 1979); *Brown* v. *Culpepper*, 559 F. 2d 274, 277 (5th Cir. 1977). The same statutory language in Section 706(k) of Title VII has been similarly interpreted. *Parker* v. *Matthews*, 411 F. Supp. 1059, 1063 (D.D.C. 1976), aff'd *sub nom. Parker* v. *Califano*, 561 F. 2d 320 (D.C. Cir. 1977); but cf. *Pearson* v. *Western Electric Co.*, 542 F. 2d 1150 (10th Cir. 1976).

pretrial conferences, and all other legal work reasonably associated with the federal suit (A. 39-40).[16]

This case thus does not involve a federal suit brought solely to recover attorney's fees for work performed to establish a right granted by state law. Even if an award of attorney's fees might be inappropriate in such circumstances, the court of appeals properly concluded that the district court erred in declining to award such fees in this case.[17]

[16]In their brief, petitioners argue that lawyers for public interest groups should not be compensated by employers found guilty of violating the law. Pet. Br. 11-12. This argument was not raised in the petition, and thus is not properly before this Court. Rule 40(d)(2) of the Rules of this Court. It has, in any event, been frequently rejected by the courts of appeals. *EEOC* v. *Enterprise Association Steamfitters*, 542 F. 2d 579, 592-593 (2d Cir. 1976), cert. denied, 430 U.S. 911 (1977); *Mid-Hudson Legal Services, Inc.* v. *G & U, Inc.*, 578 F. 2d 34, 36-37 (2d Cir. 1978); *Reynolds* v. *Coomey*, 567 F. 2d 1166, 1167 (1st Cir. 1978); *Rodriguez* v. *Taylor*, 569 F. 2d 1231, 1247-1250 (3d Cir. 1977), cert. denied, 436 U.S. 913 (1978). See also note 1 of the court of appeals' opinion in this case (Pet. App. A3-A4).

[17]This Court, accordingly, need not consider in this case whether it would be appropriate to award attorney's fees under Title VII or the Attorney's Fees Awards Act in a case in which the federal suit was not filed until after the complainant had obtained her state remedy—the situation in which the district court believed the federal court would be "a procedural conduit through which otherwise unwarranted relief could be obtained" (Pet. App. A27).

B. RESPONDENT IS ENTITLED TO ATTORNEY'S FEES FOR WORK COUNSEL PERFORMED IN STATE PROCEEDINGS IN IMPLEMENTATION OF HER RIGHTS UNDER TITLE VII

1. The State Proceedings Are Proceedings "Under" Title VII Within The Meaning Of Section 706(k)

Under Title VII, a person aggrieved is required to give the state an opportunity to investigate and attempt to resolve the charge, if state procedures are available. *Oscar Mayer & Co.* v. *Evans*, No. 78-275 (May 21, 1979), slip op. 4. Section 706(c), 42 U.S.C. 2000e-5(c), provides that whenever the unlawful employment practice occurs in a state that has a law prohibiting that employment practice, the EEOC must defer to the state for a period of 60 days. See *Love* v. *Pullman Co.*, 404 U.S. 522 (1972).[18] Moreover, Section 706(b), 42 U.S.C. 2000e-5(b), requires that EEOC must give weight, but not controlling effect, to a state administrative determination.

Title VII thus contains an "integrated, multistep enforcement procedure," *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355, 359 (1977), which requires that state and local agencies have "some opportunity to solve problems of discrimination," *Oscar Mayer & Co.* v. *Evans*, *supra*, slip op. 6, and which anticipates that the state, the aggrieved person, the employer, and the EEOC

[18] In such a state, the aggrieved party must then file a charge with EEOC within 30 days of the termination of state proceedings or within 300 days of the unlawful employment practice, whichever is earlier. Section 706(e), 42 U.S.C. 2000e-5(e). In practice, the Commission automatically assumes concurrent jurisdiction over referred charges after the state has had 60 days of exclusive jurisdiction. See *Love* v. *Pullman Co.*, *supra*, 404 U.S. at 526.

will use the state mechanisms to the fullest extent possible. Senator Clark's comments during the 1964 debates reflect the congressional emphasis on the close relationship between federal and state remedies:

> It is important to note that Title VII is so drafted that the States and the Federal Government can work together. When the bill is enacted, the State and the municipal agencies will continue to operate, and State laws will continue in force, except where they are inconsistent with Title VII.
>
> * * * * *
>
> In addition, the federal Commission can make arrangements to use and pay for the services of State and local agencies in carrying out its duties under the Federal law if the State agencies are willing.
>
> So, I take it that Title VII meshes nicely, logically, and coherently with the State and city legislation already in existence in a number of the States and a number of our cities, small as well as large. The Federal Government and the State governments could cooperate effectively and, to some extent at least, there would be a saving in the Federal budget in those areas where State laws are effective, discrimination is outlawed, and the discriminators are prosecuted.

110 Cong. Rec. 7205 (1964). See also 110 Cong. Rec. 1521 (1964) (Rep. Celler); 110 Cong. Rec. 7386 (1964) (Sen. Young); 110 Cong. Rec. 12721-12722, 12724 (1964) (Sen. Humphrey); 110 Cong. Rec. 12820 (1964) (Sen. Dirksen).

The EEOC, in the spirit of cooperation mandated by Section 709(b), 42 U.S.C. 2000e-8(b), has implemented the "meshing" of federal and state fair employment

programs contemplated by Congress by entering into work-sharing arrangements with most state and local agencies to foster prompt resolution of charges.[19] In sum, state proceedings are an integral part of Title VII's enforcement scheme.

There is no hint in the legislative history of Section 706(k) that it is to be interpreted narrowly to preclude the award of attorney's fees for work performed at the state level after referral of a charge from the EEOC. On the contrary, since Congress mandated state referral and envisaged state cooperation in the federal effort to eliminate employment discrimination—a task which this Court has several times called a matter of the "highest priority"[20]—it would be anomalous to conclude that Congress intended that attorney's fees could be awarded only for part of the legal work necessary, under the scheme of Title VII, to eliminate such discrimination.

---

[19]The work-sharing program began in FY 1975. By January 1977, work-sharing agreements had been made with 43 of the 57 state and local fair employment agencies. Center for National Policy Review, *State Agencies and Their Role in Federal Civil Rights Enforcement* 26-27 (1977). More exist today. The agreement with the New York State Division of Human Rights is typical. Under that agreement, EEOC and the Division agree that the Division will process a certain number of charges for a set fee. The EEOC refers charges falling in a designated category to the Division and takes no further action until the Division issues its final findings and orders. Once the Division has processed a charge, EEOC review of the Division's action accords substantial weight to the final findings and order of the Division. Section 706(b), 42 U.S.C. 2000e-5(b); Section 5.5, EEOC Compliance Manual.

[20]*Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 47; *Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 415; *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 763 (1976); *Christiansburg Garment Co.* v. *EEOC*, *supra*, 434 U.S. at 416-417.

The reasoning of the dissent below, however, would lead to precisely that anomaly. Its conclusion that "remuneration of private counsel successful in state agency and state judicial proceedings in vindicating rights under state law should be determined by the law of the state" (Pet. App. A16) overlooks the fact that a primary purpose of Title VII was to supplement available state remedies for employment discrimination. That is why there is a need for federal-state collaboration, and why EEOC has the authority to evaluate state remedial action under Section 706(b), 42 U.S.C. 2000e-5(b). See, *e.g.*, *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974); *Voutsis* v. *Union Carbide Corp.*, 452 F. 2d 889 (2d Cir. 1971), cert. denied, 406 U.S. 918 (1972). Since the awarding of attorney's fees is necessary to give "complete relief" to make a successful plaintiff whole (see point 2, *infra*), such an award is an appropriate federal supplement to the state-provided relief (*Albemarle Paper Co.* v. *Moody*, *supra*, 422 U.S. at 421).

2. Use Of Private Counsel Is Essential In The New York Proceedings To Preserve Federal Rights

The New York state procedure, to which plaintiff was required to resort, mandates adversarial quasi-judicial hearings leading to findings of fact, administrative appeals, and judicial review. Participation by the aggrieved person's attorney at each of these stages is an important means of preserving federal rights under Title VII and 42 U.S.C. 1981 and of obtaining the relief to which those statutes entitle him.[21]

---

[21]Section 706(k) and 42 U.S.C. 1988 explicitly provide fees for "any action *or* proceeding" (emphasis supplied) and thus are not limited to judicial actions. *Johnson* v. *United States*, 554 F. 2d 632 (4th Cir. 1977). While "proceedings" is used in Sections 706(i) and 706(j) of Title VII, 42 U.S.C. 2000e-5(i) and 2000e-5(j), to refer to

a. Representation by counsel at the administrative proceedings in New York is crucial because the administrative hearing establishes an evidentiary record and results in findings that have a binding effect on the parties in subsequent federal litigation.

The state administrative proceedings, and their attendant judicial review, are very similar to federal administrative proceedings under Section 717 of Title VII, 42 U.S.C. 2000e-16, for which the presence of the aggrieved person's attorney has been deemed appropriate and the attorney's time compensable.[22] As one court of appeals has explained:

> For a conscientious lawyer representing a federal employee in a Title VII claim, work done at the administrative level is an integral part of the work necessary at the judicial level. Most obviously an attorney can investigate the facts of his case at a time when investigation will be most productive. The attorney may thus gain the familiarity with the facts of the case that is so important in the fact-intensive area of employment discrimination. Perhaps even more important, the administrative proceedings allow the attorney to help make a

court proceedings, Sections 706(b) and 706(c), 42 U.S.C. 2000e-5(b) and 2000e-5(c), refer repeatedly to state and local "proceedings." Thus, the term "proceedings" as used in Section 706(k) is broad enough to cover both court actions and state and federal administrative activities. Compare 42 U.S.C. 2000a-3(b), limiting awards solely to any action under that statute. Three courts of appeals have interpreted Section 706(k) to permit awards of attorney's fees for representation at federal administrative hearings under Title VII. *Fischer* v. *Adams*, 572 F. 2d 406 (1st Cir. 1978); *Foster* v. *Boorstin*, 561 F. 2d 340 (D.C. Cir. 1977); *Parker* v. *Califano*, 561 F. 2d 320 (D.C. Cir. 1977); *Johnson* v. *United States*, 554 F. 2d 632 (4th Cir. 1977).

[22]See cases cited *supra*, note 21.

> record that can be introduced at any subsequent District Court trial.[33] Especially in an instance where development of a thorough administrative record results in an abbreviated but successful trial, refusing to award attorneys' fees for work at the administrative level would penalize the lawyer for his pretrial effectiveness and his resultant conservation of judicial time.
>
> [33]The Supreme Court pointed out in *Chandler* v. *Roudebush*, [425 U.S. at 863 n. 39]:
>
> > Prior administrative findings made with respect to an employment discrimination claim may, of course, be admitted as evidence at a federal-sector trial de novo. See Fed. Rule Evid. 803(8)(C). *Cf. Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 60 [1975]. . . .

Parker v. *Califano*, *supra*, 561 F. 2d at 333.[23]

The district court and the dissent below concluded (Pet. App. A16-A18; A. 27) that private persons need not appear by counsel at the state level because attorneys employed by the state are available at the hearing. But the state does not provide attorneys during the initial investigation to represent an aggrieved person. And even though Division attorneys may appear at the subsequent hearing, that is not justification for denying attorney's fees to counsel for the person aggrieved. In an analogous situation, Congress gave persons an absolute right to intervene in civil actions brought on their behalf under

[23]Moreover, "[e]ven when discrimination is patent, an employee might view his Title VII rights as not 'worth' enforcing if he knew he would have to bear the cost of attorneys' fees for the administrative proceedings that are a necessary first step." *Parker* v. *Califano*, *supra*, 561 F. 2d at 334.

Title VII by the EEOC or the Attorney General (Section 706(f)(1), 42 U.S.C. 2000e-5(f)(1)). It cannot be seriously doubted that in that situation, Congress intended that attorney's fees would be awarded to successful intervening plaintiffs for work reasonably performed by private counsel, notwithstanding the voluntary nature of the intervention. The same is true at the state level. Sections 706(f)(1) of Title VII and 297(4)(a) of the New York Human Rights Act, N.Y. Exec. Law (McKinney 1972-1978 Supp.), both reflect legislative understanding that public agencies vindicating vital public interests may not adequately represent the individual, because the interests of the government and the narrower interest of the individual often diverge. See *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 537-539 (1972). When this occurs, government attorneys have paramount duties to their employer, not to the individual, as the state regulations and its affidavits in this case make plain (A. 60-61; Opp. App. 15a-18a; see also Division Amicus Br. 4-8). Moreover, in state proceedings, while attorneys representing the state are concerned only with enforcing state law, private counsel have the additional duty of ensuring that the record created at the state hearing will support pending or subsequent federal litigation.[24] Furthermore, "[s]ettlement of the charge is possible at any stage of the proceedings and agreements may, accordingly, have to be negotiated and rights may be waived." *Parker* v. *Califano*, *supra*, 561 F. 2d at 332.[25]

---

[24]For example, private counsel may wish to assure that the record is adequate to meet differences in federal substantive law or in the applicable burden of proof.

[25]See note 14, *supra*.

b. Private counsel is also vital at the state judicial review stage in order to protect the charging party's federal rights. If the charging party chooses to seek review in the state courts, the determinations of the state court have been held in the Second Circuit to have "res judicata" effects with respect to subsequent federal actions under Title VII and Section 1981. *Sinicropi* v. *Nassau County*, 601 F. 2d 60 (2d Cir. 1979); *Mitchell* v. *National Broadcasting Co.*, 553 F. 2d 265 (2d Cir. 1977). But cf. *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 60 & n.21. If, in choosing to go to a forum in which attorney's fees are not available, the charging party were held to that choice, as the district court suggests (Pet. App. A27), the net result undoubtedly would be to encourage the bringing of actions in the federal, rather than the state, courts; but at least in that situation the charging party would have the benefit of choice.

Where, however, the decision of the state appellate review board is in favor of the charging party, that party may be brought into the state courts against his will. As in this case, the decision to go to the state court is then made by the employer, not the charging party. It is true that a Division attorney will represent the state in that proceeding but, as the Division affidavits and brief (A. 60-61; Division Amicus Br. 6) make clear, the state attorney again appears in support of the administrative determination rather than the complainant.[26] Moreover, if a favorable decision by the Division is reversed, the Division attorney is unable to represent the charging

---

[26]The difference in position may be substantial. For example, respondent here could have challenged the agency decision to dismiss the charges against petitioner's assistant manager, or to limit her back pay award to $52 a week. In deciding not to do so, she had the advice of counsel devoted solely to her own individual interests.

party in the state courts (A. 61). Thus, a charging party has no assurance that in state proceedings his rights will be adequately protected by Division counsel.

Petitioner argues that under the circumstances of this case, no conflict arose. An aggrieved individual approaching the New York administrative system cannot, however, foresee that he will prevail at all stages, and that no conflict will arise. The potentiality of a conflict is what requires a complainant to seek private counsel, as respondent did here—where, indeed, a conflict could have materialized (see note 26, *supra*).

3. The Award Of Attorney's Fees To Parties Who Prevail In State Proceedings Furthers The Effective Operation Of Title VII

If a prevailing complainant, who has made full and effective use of the state proceedings, is denied attorney's fees, that complainant is, in effect, penalized for pursuing the state remedy diligently. Respondent could have abandoned state proceedings; obtained an EEOC right to sue letter after 180 days; and attempted to litigate the merits of her claim in federal court. She then unquestionably would have been eligible for an award of attorney's fees. If she were not similarly entitled to a complete attorney fee award now, covering substantially all the legal work required, she would be penalized for making full and effective use of the state proceedings, the initial use of which is required by Title VII and the continued use of which is encouraged by EEOC procedures and by the practical difficulty of obtaining prompt relief from the EEOC because of its workload.

A reversal of the judgment below would tend to discourage the use of state proceedings. Complainants with counsel would be motivated to minimize their efforts at the state level, and to concentrate instead on

suit in the federal courts. An increase in litigation of Title VII and Section 1981 suits on the merits would, of course, involve vastly more federal judicial time and resources than would applications for attorney's fees.

Such a holding would also result in a longer period between the discriminatory event and development of a record. A record developed promptly is of substantial importance in a decisionmaker's ability to evaluate the facts in an employment discrimination case. A holding that would deprive litigants of the incentive, and perhaps the ability, to develop a record adequately and promptly would inhibit the goal of speedy resolution of employment discrimination charges.

In sum, since the charging party was required under Title VII to submit to a state procedure in which the assistance of counsel is reasonably necessary to vindicate federally protected rights, the court below correctly held that attorney's fees for work performed in the state proceedings should be awarded under Title VII.

CONCLUSION

The judgment of the court of appeals should be affirmed.

WADE H. MCCREE, JR.
Solicitor General

DREW S. DAYS, III
Assistant Attorney General

HARRIET S. SHAPIRO
Assistant to the Solicitor General

LEROY D. CLARK
General Counsel

JOSEPH T. EDDINS
Associate General Counsel

LUTZ ALEXANDER PRAGER
MARK S. FLYNN
Attorneys
Equal Employment Opportunity Commission

JANUARY 1980

DOJ-1980-01